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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12131
Non-Argument Calendar

D.C. Docket No. 3:17-cv-00494-BJD-PDB

JAMEL MOBLEY,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(August 31, 2020)

Before WILLIAM PRYOR, Chief Judge, JILL PRYOR and LAGOA, Circuit Judges.

PER CURIAM:

Jamel Mobley—a Florida state prisoner serving a 35-year sentence for attempted second-degree murder, attempted armed robbery, and aggravated assault—appeals the district court's denial of his 28 U.S.C. § 2254 petition. On appeal, he argues that his trial counsel was constitutionally ineffective for failing to preserve for appeal a challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986),[1] to the state's use of peremptory strikes during voir dire in his underlying criminal proceedings. He contends that the state habeas court unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984), and that his counsel's failure to preserve the issue was prejudicial because the *Batson* violation would have warranted an automatic reversal of his conviction on appeal or resulted in a reasonable probability that the state trial court would have reversed its rulings on the peremptory strikes had his counsel renewed the objection. After careful consideration and review, we affirm the district court's denial of relief.

In 2009, Mobley was charged with attempted first-degree murder, attempted felony murder, attempted armed robbery, and aggravated assault stemming from a failed carjacking. Two years later, a jury found him guilty of attempted second-

[1] Mobley originally articulated his challenge with reference to *State v. Neil*, 457 So. 2d 481 (Fla. 1984). In the interest of clarity, we refer simply to *Batson*, given that *Neil* is Florida's counterpart to *Batson*. *See King v. Moore*, 196 F.3d 1327, 1331 (11th Cir. 1999) (stating that *Neil* anticipated *Batson*'s holding by two years).

degree murder, attempted felony murder, attempted armed robbery, and aggravated assault. Thereafter, he was sentenced to serve three concurrent 30-year prison terms in addition to a consecutive five-year sentence. Mobley appealed his conviction, raising various issues on direct appeal.

Among the issues Mobley raised was a *Batson* claim. He argued that the trial court erred in overruling his attorney's *Batson* challenge and allowing the state to exercise peremptory strikes against three prospective Black jurors. The Florida First District Court of Appeal declined to address Mobley's claim because his attorney failed to preserve the issue for appeal. *See Mobley v. State*, 97 So. 3d 344, 345 (Fla. Dist. Ct. App. 2012). As a result, the court affirmed the second-degree murder, attempted armed robbery, and the aggravated assault convictions.[2]

Mobley later filed a Florida Rule of Criminal Procedure 3.850 motion in which he alleged, among other things, that he received ineffective assistance of counsel because his trial counsel failed to preserve his *Batson* challenge. That motion was denied based on the state habeas court's conclusion that "failure to preserve issues for appeal does not show the necessary prejudice under *Strickland*" and that "prejudice must be assessed based upon its effect on the results of the trial,

[2] The state conceded that the attempted felony murder conviction was invalid under the merger doctrine. Upon remand, the trial court struck the attempted felony murder count.

not on its effect on appeal." Doc. 21-7 at 107 (internal quotation marks omitted).[3] The state habeas court determined that Mobley had not shown that counsel's failure to preserve the *Batson* issue for appeal was prejudicial to the outcome of his trial. The First District Court of Appeal affirmed the denial without issuing a written opinion.

In April 2017, Mobley filed a 28 U.S.C. § 2254 petition for a writ of habeas corpus in the United States District Court for the Middle District of Florida. In his petition, he raised several claims, including the *Batson* claim. As to the *Batson* claim, the district court concluded that the state habeas court's decision to deny the claim was not contrary to or an unreasonable application of *Strickland* or based on an unreasonable determination of the facts. This appeal followed. A judge of this Court granted Mobley a certificate of appealability on the following issue:

> Whether the district court erred by denying Mr. Mobley's claim that counsel was ineffective for failing to preserve for appeal his challenge to the state's use of peremptory strikes, after concluding that the state court's rejection of it was not contrary to, or an unreasonable application of, *Strickland v. Washington*, 466 U.S. 668 (1984).[4]

When examining a district court's denial of a § 2254 habeas petition, "we review questions of law and mixed questions of law and fact *de novo*, and findings

[3] "Doc. #" refers to the corresponding numbered entry on the district court's docket.

[4] We do not address Mobley's argument that the denial of the *Batson* challenge at trial was error because the certificate of appealability is limited to Mobley's ineffective assistance of counsel claim. In addition, Mobley has not challenged the district court's denial of that claim as procedurally defaulted, so the issue has been abandoned.

of fact for clear error." *LeCroy v. Sec'y, Fla. Dep't of Corr.*, 421 F.3d 1237, 1259 (11th Cir. 2005). The district court's determination that the state court decision was reasonable is reviewed *de novo*. *Id.*

Under the Sixth Amendment of the Constitution, a defendant has the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland*, 466 U.S. at 686. To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that the defendant was prejudiced as a result, meaning that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 688, 694.

Mobley argues that the district court erred in denying his claim that his trial counsel was ineffective for failing to preserve for appeal his challenge to the state's use of peremptory strikes, after concluding that the state court's rejection of it was not contrary to, or an unreasonable application of, *Strickland*. In Mobley's view, he suffered prejudice because proper preservation of the *Batson* challenge (renewing the objection to the racially motivated strikes at the conclusion of voir dire, before the jury was sworn in) would have resulted in either a reversal on appeal or "a reasonable probability that the court would have realized its errors" and would not have allowed the state to strike the three Black jurors. Appellant's Br. at 26. Thus, he contends, the district court erred in denying his claim. We reject Mobley's argument because it fails to recognize the role of federal courts in reviewing habeas petitions based on postconviction claims adjudicated in state courts.

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a federal court may grant habeas relief with respect to a claim adjudicated in state court only if the state court proceedings resulted in a decision that was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Maharaj v. Sec'y for Dep't. of Corr.*, 432 F.3d 1292, 1308 (11th Cir. 2005).

"A state court acts contrary to clearly established federal law if it confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court of the United States and nevertheless arrives at a result different from its precedent." *Reese v. Sec'y, Fla. Dep't of Corr.*, 675 F.3d 1277, 1286 (11th Cir. 2012) (internal quotation marks omitted). A state court's decision is based on an unreasonable application of clearly established federal law if it "identifies the correct governing legal rule but unreasonably applies it to the facts of the particular state prisoner's case, or when it unreasonably extends, or unreasonably declines to extend, a legal principle from Supreme Court case law to a new context." *Id.*

(internal quotation marks omitted). Here, Mobley cannot establish that the state habeas decision was contrary to clearly established federal law because the Supreme Court has not addressed a set of materially indistinguishable facts. Further, as discussed below, he cannot establish that the state unreasonably applied *Strickland* to the facts of this case.

Under Florida law, simply objecting to the state's possibly discriminatory strikes, and then countering any purportedly race-neutral explanation given by the prosecution, does not suffice to preserve a *Batson* claim for appeal. Rather, trial counsel must press the already-rejected challenge a second time at the conclusion of voir dire, either by expressly renewing the objection or by accepting the jury pursuant to a reservation of this claim. *Joiner v. State*, 618 So. 2d 174, 176 (Fla. 1993); *see also Melbourne v. State*, 679 So. 2d 759, 765 (Fla. 1996) (ruling that a defendant "failed to preserve" a claim of discriminatory jury selection "because she did not renew her objection before the jury was sworn").

Citing *Davis v. Sec'y for Dep't of Corr.*, 341 F.3d 1310 (11th Cir. 2003), Mobley argues that he was substantially prejudiced by his counsel's failure to preserve the *Batson* challenge. In *Davis,* this Court considered the issue of whether an attorney's failure to preserve a *Batson* claim for appeal prejudiced the defendant. 341 F.3d at 1314. We held that "when a defendant raises the unusual claim that trial counsel, while efficacious in raising an issue, nonetheless failed to preserve it for appeal, the appropriate prejudice inquiry asks whether there is a reasonable likelihood of a more favorable outcome on appeal had the claim been preserved." *Id.* at 1316. In reaching this conclusion, however, we noted that affording § 2254(d)(1) deference—thus requiring us to determine that the state court's ruling was contrary to or an unreasonable application of established federal law—was not necessary because the state courts did not resolve the merits of Davis's claim. *Id.* at 1313. But such deference is necessary in this case. Here, we consider the issue of whether the state habeas court unreasonably applied *Strickland* in concluding that counsel's failure to preserve the *Batson* challenge did not result in the requisite prejudice for affording habeas relief. Accordingly, *Davis* is inapposite and does not apply to this appeal. Further, Mobley has not identified any clearly established federal law with materially indistinguishable facts and thus cannot show that the state courts acted contrary to clearly established federal law. We thus move on to whether the state unreasonably applied the prejudice prong of *Strickland* to the facts of this case.

Florida courts have previously concluded that failing to preserve a *Batson* challenge does not automatically demonstrate *Strickland* prejudice. In *Carratelli v. State*, the Florida Supreme Court concluded that, in the postconviction context, "a defendant alleging that counsel was ineffective for failing to object or preserve a claim of reversible error in jury selection must demonstrate prejudice at the trial, not on appeal." 961 So. 2d 312, 323 (Fla. 2007). In that case, the defendant argued that his counsel was ineffective for failing to renew his objection to the trial court's denial of his cause challenges during voir dire. *Id.* at 316. The Florida Supreme Court concluded that prejudice should be measured at trial rather than on appeal. Accordingly, the Florida Supreme Court held that a finding of prejudice under *Strickland* requires the defendant to show that a juror was actually biased against him. *Id.* at 324. In so holding, the Court specifically noted that *Davis* misconstrued Florida law. *Id.* at 321. Florida appellate courts have applied this actual bias standard to ineffective assistance claims involving counsel's failure to object to potentially racially motivated peremptory strikes. *See, e.g.*, *Jones v. State*, 10 So. 3d 140, 142 (Fla. Dist. Ct. App. 2009). Mobley did not attempt to establish that a juror placed on the jury despite his *Batson* challenge was actually biased against him. Thus, the state habeas court did not unreasonably apply *Strickland* in concluding that Mobley could not demonstrate prejudice and denying his ineffective assistance of counsel claim.

Because Mobley cannot establish that the state court acted contrary to or unreasonably applied clearly established federal law, the district court did not err in denying his habeas petition.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
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August 31, 2020

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 19-12131-JJ
Case Style: Jamel Mobley v. Secretary, Florida Department, et al
District Court Docket No: 3:17-cv-00494-BJD-PDB

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Tiffany A. Tucker, JJ at (404)335-6193.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Djuanna H. Clark
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

JAMEL MOBLEY,

Petitioner,

v. **Case No: 3:17-cv-494-J-39PDB**

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS and FLORIDA ATTORNEY GENERAL,

Respondents.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that pursuant to this Court's Order, filed May 3, 2019, judgment is hereby entered denying the Petition and dismissing this case with prejudice.

Date: May 6, 2019

ELIZABETH M. WARREN,
CLERK

s/*A. Jones*, Deputy Clerk

Copy to:

Counsel of Record
Unrepresented Parties

CIVIL APPEALS JURISDICTION CHECKLIST

1. **Appealable Orders**: Courts of Appeals have jurisdiction conferred and strictly limited by statute:

    (a) **Appeals from final orders pursuant to 28 U.S.C. Section 1291**: Only final orders and judgments of district courts, or final orders of bankruptcy courts which have been appealed to and fully resolved by a district court under 28 U.S.C. Section 158, generally are appealable. A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Pitney Bowes, Inc. V. Mestre, 701 F.2d 1365, 1368 (11th Cir. 1983). A magistrate judge's report and recommendation is not final and appealable until judgment thereon is entered by a district court judge. 28 U.S.C. Section 636(c).

    (b) **In cases involving multiple parties or multiple claims**, a judgment as to fewer than all parties or all claims is not a final, appealable decision unless the district court has certified the judgment for immediate review under Fed.R.Civ.P. 54(b), Williams v. Bishop, 732 F.2d 885, 885-86 (11th Cir. 1984). A judgment which resolves all issues except matters, such as attorneys' fees and costs, that are collateral to the merits, is immediately appealable. Budinich v. Becton Dickinson & Co., 486 U.S. 196, 201, 108 S. Ct. 1717, 1721-22, 100 L.Ed.2d 178 (1988); LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 837 (11th Cir. 1998).

    (c) **Appeals pursuant to 28 U.S.C. Section 1292(a)**: Appeals are permitted from orders "granting, continuing, modifying, refusing or dissolving injunctions or refusing to dissolve or modify injunctions..." and from "[i]nterlocutory decrees...determining the rights and liabilities of parties to admiralty cases in which appeals from final decrees are allowed." Interlocutory appeals from orders denying temporary restraining orders are not permitted.

    (d) **Appeals pursuant to 28 U.S.C. Section 1292(b) and Fed.R.App.P.5**: The certification specified in 28 U.S.C. Section 1292(b) must be obtained before a petition for permission to appeal is filed in the Court of Appeals. The district court's denial of a motion for certification is not itself appealable.

    (e) **Appeals pursuant to judicially created exceptions to the finality rule:** Limited exceptions are discussed in cases including, but not limited to: Cohen V. Beneficial Indus. Loan Corp., 337 U.S. 541,546,69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949); Atlantic Fed. Sav. & Loan Ass'n v. Blythe Eastman Paine Webber, Inc., 890 F. 2d 371, 376 (11th Cir. 1989); Gillespie v. United States Steel Corp., 379 U.S. 148, 157, 85 S. Ct. 308, 312, 13 L.Ed.2d 199 (1964).

2. **Time for Filing:** The timely filing of a notice of appeal is mandatory and jurisdictional. Rinaldo v. Corbett, 256 F.3d 1276, 1278 (11th Cir. 2001). In civil cases, Fed.R.App.P.4(a) and (c) set the following time limits:

    (a) **Fed.R.App.P. 4(a)(1)**: A notice of appeal in compliance with the requirements set forth in Fed.R.App.P. 3 must be filed in the district court within 30 days after the entry of the order or judgment appealed from. However, if the United States or an officer or agency thereof is a party, the notice of appeal must be filed in the district court within 60 days after such entry. **THE NOTICE MUST BE RECEIVED AND FILED IN THE DISTRICT COURT NO LATER THAN THE LAST DAY OF THE APPEAL PERIOD - no additional days are provided for mailing.** Special filing provisions for inmates are discussed below.

    (b) **Fed.R.App.P. 4(a)(3)**: "If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later."

    (c) **Fed.R.App.P.4(a)(4)**: If any party makes a timely motion in the district court under the Federal Rules of Civil Procedure of a type specified in this rule, the time for appeal for all parties runs from the date of entry of the order disposing of the last such timely filed motion.

    (d) **Fed.R.App.P.4(a)(5) and 4(a)(6)**: Under certain limited circumstances, the district court may extend the time to file a notice of appeal. Under Rule 4(a)(5), the time may be extended if a motion for an extension is filed within 30 days after expiration of the time otherwise provided to file a notice of appeal, upon a showing of excusable neglect or good cause. Under Rule 4(a)(6), the time may be extended if the district court finds upon motion that a party did not timely receive notice of the entry of the judgment or order, and that no party would be prejudiced by an extension.

    (e) **Fed.R.App.P.4(c)**: If an inmate confined to an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a declaration in compliance with 28 U.S.C. Section 1746 or a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

3. **Format of the notice of appeal**: Form 1, Appendix of Forms to the Federal Rules of Appellate Procedure, is a suitable format. See also Fed.R.App.P. 3(c). A pro se notice of appeal must be signed by the appellant.

4. **Effect of a notice of appeal**: A district court loses jurisdiction (authority) to act after the filing of a timely notice of appeal, except for actions in aid of appellate jurisdiction or to rule on a timely motion of the type specified in Fed.R.App.P. 4(a)(4).